

P.E.R.C. NO. 2016-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PEMBERTON,

Petitioner,

-and-

Docket No. CU-2013-038

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 1040),

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Communications Workers of America, Local 1040's request for review of the Director of Representation's decision in a clarification of unit petition. The Commission finds that the CWA did not identify any substantial factual issue decided by the Director that could be considered clearly erroneous or warrant an evidentiary hearing, and that the Director properly applied the managerial executive test for municipal employees in determining that the public works superintendent and supervisor of recreation formulated and implemented policy and should therefore be excluded from the unit.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Archer & Greiner, attorneys (David
A. Rapuano, of counsel)

For the Respondent, Weissman & Mintz, attorneys
(Rosemarie Cipparulo, of counsel)

DECISION

On September 26, 2014, the Communications Workers of America, Local 1040 (CWA) filed a request for review of D.R. No. 2015-1, 41 NJPER 135 (¶46 2014). In that decision, the Director of Representation clarified a white-collar, supervisors unit of Pemberton Township (Township) employees represented by the CWA to exclude the titles of supervising clerk typist, public works superintendent, and supervisor of recreation. The Director concluded that the duties of the supervising clerk typist rendered the position confidential under the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq. The Director excluded the other two titles finding that they were

managerial executives as defined by the Act. Specifically, after conducting the investigation required by N.J.A.C. 19:11-2.2, the Director determined that the Township had demonstrated that the two department heads actually formulated and implemented policy for the Township. In addition, the Director determined that inclusion of the public works superintendent in the existing unit would be inappropriate because that position's job duties create a potential, substantial conflict among employees in the unit.

In its request, the CWA concedes that the supervising clerk typist is a confidential employee within the meaning of the Act. However, it asserts that neither the public works superintendent nor the supervisor of recreation meet the definition of managerial executive. It also contends that "there is nothing in the record to suggest that any conflict created by the inclusion of [the public works superintendent] in the CWA negotiations unit is anything other than *de minimis*."

The Township opposes the CWA's request for review. It notes that during the administrative investigation, it provided the Director initial and supplemental certifications of the Township's Business Administrator; that the initial certification consisted of forty-seven paragraphs and thirteen pages setting forth detailed facts and numerous specific examples concerning the two positions; that the initial certification was accompanied by fourteen exhibits supporting the Township's position; and that

the supplemental certification provided additional evidence of the supervisor of recreation's formulation of Township policy. The Township maintains that the CWA's submissions were far less comprehensive and detailed than the Township's. It also notes that although the Director provided the parties with her tentative findings and conclusions and invited them to respond to her if they believed her tentative determinations were incorrect or that there were new facts that should be brought to her attention, neither party submitted a response.

We find that the grounds for review have not been met and therefore deny the CWA's request.

N.J.A.C. 19:11-8.2(a) states that a request for review may be granted only for one or more of these compelling reasons:

1. A substantial question of law is raised concerning the interpretation or administration of the Act or these rules;
2. The Director of Representation's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the party seeking review;
3. The conduct of the hearing or any ruling made in connection with the proceeding may have resulted in prejudicial error; and/or
4. An important Commission rule or policy should be reconsidered.

The CWA requests review of the Director's decision or, in the alternative, that the Commission order a hearing to further

develop the record, asserting that the Director's decision on a substantial factual issue is clearly erroneous and that a substantial question of law is raised concerning the interpretation of the Act. With regard to the first claim, the CWA has not identified any "substantial factual issue" decided by the Director that could be considered "clearly erroneous" or warrant convening an evidentiary hearing.

With regard to the second claim, the CWA argues that the public works superintendent and supervisor of recreation cannot be classified as managerial executives because they are under the direction and supervision of the elected mayor or Township Business Administrator and that in a municipality with a mayor-council form of government such as Pemberton Township, only the mayor and business administrator can qualify for "managerial executive" status. In support of that argument, the CWA relies upon the statutory language pertaining to school districts.

The CWA's urged construction of the statute is contrary to its plain terms. N.J.S.A. 34:13A-3(f) provides that in the case of any public employer but the State, managerial executives are persons who formulate management policies and practices and persons charged with the responsibility of directing their effectuation "except in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district."

To reach the result urged by the CWA in the case of a municipality, the Commission would have to rewrite the statute contrary to its express terms. We are not empowered to do so. Moreover, N.J.S.A. 34:13A-3(f) has not been interpreted as categorically excluding subordinate department heads from the definition of managerial executive. The test for determining which municipal employees qualify as managerial executives was articulated by the Court in New Jersey Turnpike Auth. v. AFSCME, Council 73, 150 N.J. 331 (1997) and applied by the Director based on the evidence presented to her. Accordingly, the CWA has not presented a substantial question of law concerning the interpretation of the Act.

ORDER

The request for review is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau and Eskilson voted in favor of this decision. Commissioners Jones and Voos voted against this decision. Commissioners Bonanni and Wall were not present.

ISSUED: November 19, 2015

Trenton, New Jersey